No. 95-1184

In The

Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* FOR SUN-MAID GROWERS OF CALIFORNIA IN SUPPORT OF RESPONDENTS

CATHERINE A. CONWAY
VINCENT M. WALDMAN*
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone (310) 312-4000
Counsel of Record

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

BRIEF AMICUS CURIAE FOR SUN-MAID GROWERS OF CALIFORNIA IN SUPPORT OF RESPONDENTS

Sun-Maid Growers of California hereby submits this brief *amicus curiae* in support of respondents. Pursuant to Rule 37.3(a) of this Court, petitioner and respondents have both consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,[1] and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 1,200 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

---

[1] Sun-Maid is incorporated under the laws of California, in particular the provisions of CAL. FOOD & AG. CODE §§ 54000 *et seq.*, dealing with agricultural marketing cooperatives. Pursuant to section 7.09 of Sun-Maid's Bylaws and Raisin Marketing Agreement, the cooperative is authorized to act "on behalf of each grower member under any governmental marketing agreement, order, program or plan relating to the marketing of raisins, including the exercise of any right to vote on behalf of each member."

On behalf of its 1,200 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.[2]

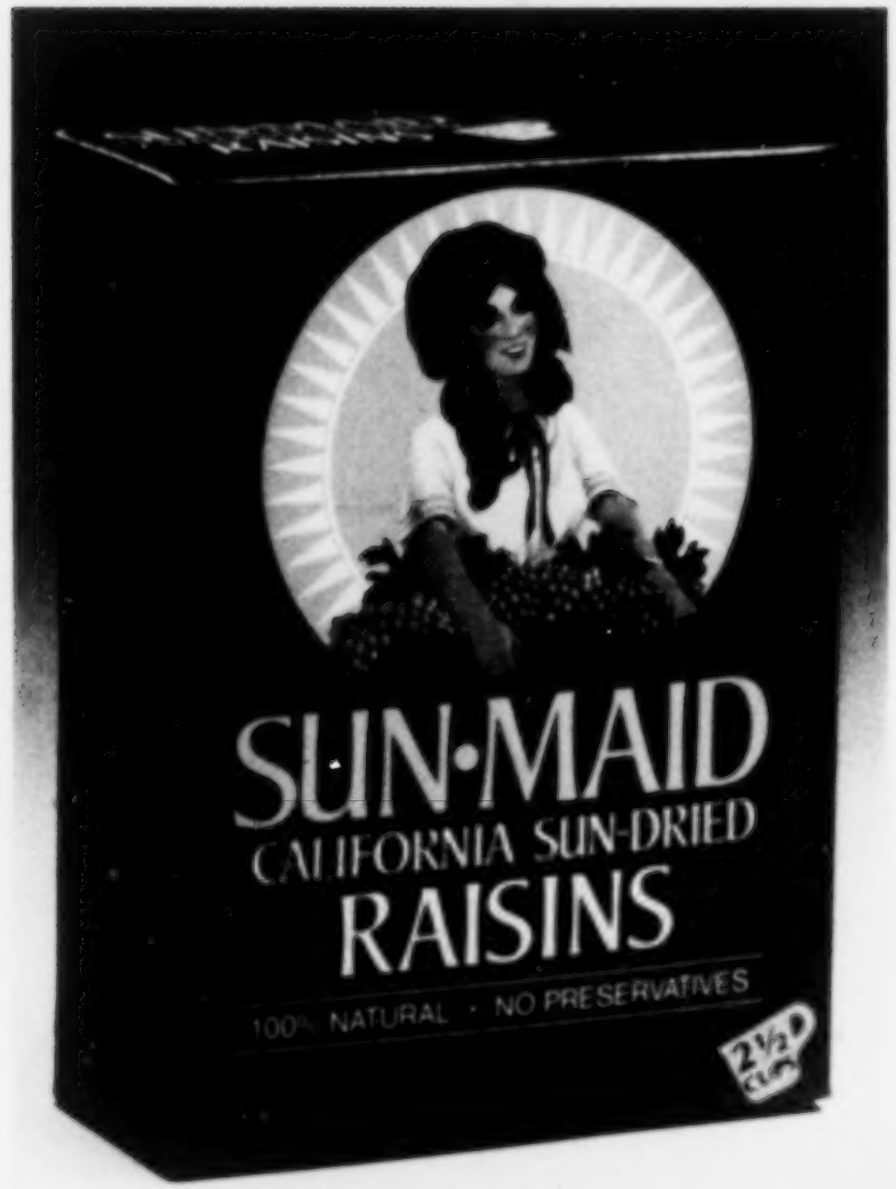
The marketing of California raisins (like the peaches and nectarines at issue in the present case) is regulated under the federal Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 *et seq.* Under federal law, the Raisin Administrative Committee is financed by assessments against the handlers in the industry, and with the money it receives the committee is authorized, among other things, to provide for marketing and promotion, including paid advertising, designed to promote the marketing of raisins in domestic and foreign markets. 7 C.F.R. § 989.53 (1996). The raisin regulations (unlike the peach and nectarine program) authorize the Raisin Administrative Committee to grant credit to a handler against its assessment for some or all of the handler's own direct expenditures for promotion and advertising. 7 C.F.R. §§ 989.53(b), 989.80 (1996). However, at present the Raisin Administrative Committee is not allowing such credits.

From 1949 to 1994 the California raisin industry was also subject to a state marketing order created pursuant to the California Marketing Act of 1937, CAL. FOOD & AG. CODE §§ 58601 *et seq.* The California Raisin Advisory Board ("CALRAB") was formed to administer the state

---

[2] Sun-Maid's share of the world's sun-dried raisin crop is larger – approximately 24%. In 1995 Sun-Maid increased sales to $194.3 million, up from the previous year's $186.2 million.

The California Dancing Raisins



The Sun-Maid

marketing order.[3] CALRAB was responsible for the "California Dancing Raisins" ads of the 1980s and 1990s.

The "Dancing Raisins" (and CALRAB's other activities) were funded by assessments similar to those under the federal program. In its last crop year (August 1, 1993 through July 31, 1994), CALRAB received an assessment of $32.50 per ton, from *both* the grower and the processor/marketer, for each ton of raisins received for sale by a handler. Since Sun-Maid's grower-members also bear the cooperative's costs of processing and marketing, this meant that Sun-Maid's members were effectively assessed $65 per ton. Sun-Maid received a "brand credit" of $1 for each $2 it spent in media advertising, but this was capped at about 75% of the processor assessments, so that Sun-Maid received credit for about $2.1 million against $5.2 million in total assessments.

Although this state program has now terminated, the federal program continues and there have been repeated discussions of a new state marketing order. Sun-Maid and its farmer members are opposed to mandatory generic advertising programs, and have an interest in insuring that any future federal or state marketing regimes comply with the constitutional rights of Sun-Maid's 1,200 grower-members.

---

[3] To Sun-Maid's knowledge, CALRAB and the state raisin marketing order were created without adherence to the California Administrative Procedure Act and their governing regulations were not codified in the California Administrative Code.

SUMMARY OF ARGUMENT

The large number of briefs filed on both sides of this case speak to its importance, and to the disagreement about the appropriate legal test to be applied here. The parties and other *amici* discuss the applicable legal standards thoroughly. Our *amicus* brief will not belabor that debate. Rather, our purpose here is to provide the Court with a different perspective on two important issues, both of which suggest that the program at issue in this case cannot withstand constitutional scrutiny under *any* of the potentially applicable legal standards.

1. There are serious reasons why a grower or marketer might object to the messages conveyed in so-called "generic advertising." In effect, government-compelled "generic" advertising programs force all members of an entire industry to speak with a single voice, and to be identified with a single message; such programs thus subvert the ability of independent growers and marketers, acting alone or through cooperatives, to associate and deliver their own messages. Such "generic" government-mandated advertising dilutes and obscures a grower's or cooperative's ability to develop its own brand identity and consistent advertising messages. In Sun-Maid's own case, the "generic" advertising has actually functioned to promote the products of Sun-Maid's competitors, even though Sun-Maid was the single largest funder of such advertising. Misuses and anti-competitive effects of so-called "generic advertising" can be seen throughout the agricultural industry.

2. Even if the government does have a permissible interest in requiring growers and sellers to buy more

advertising than they would pay for of their own volition, to avoid "free riders," the burdens of any program on First Amendment rights must be no more significant than necessary. Less burdensome alternatives clearly exist here.

(a) First, cooperatives like Sun-Maid provide a *voluntary* alternative through which growers may gain the advantages of scale without being forced to support messages they oppose. Congress has recognized this in the recently-adopted FAIR Act, which expressly acknowledges the contributions of cooperative advertising to industry promotion efforts. Thus, government-mandated advertising programs should be permissible, if at all, only in industries where voluntary cooperatives are not a possible option.

(b) Second, some mandatory assessment programs already allow credits against the assessment for voluntary branded advertising. As several of the other courts to consider this issue have ruled, the Constitution requires at a bare minimum that such credits be afforded in all cases, allowing any "free rider" concerns to be answered without unnecessary coercion. Since the peach and nectarine programs at issue in the present case allowed no credits at all, they cannot survive constitutional scrutiny under any standard.

ARGUMENT

1. Mandatory so-called "generic advertising" programs improperly force growers and marketers to finance and be associated with messages they do not support, and substantially interfere with their ability to deliver their own messages.

Some of the other courts which have considered this issue, and some of the briefs in this case, have expressed skepticism of the reasons for growers to oppose generic advertising. When the California Court of Appeals recently struck down the state's mandatory assessments to support generic kiwifruit promotion, the dissenting justice remarked, "It is difficult to conceive how *any* kiwifruit grower could claim disagreement with the promotional messages of the Commission." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 794, 53 Cal. Rptr. 2d 138, 154 (3d Dist. 1996) (Raye, J., dissenting), *modified*, 46 Cal. App. 4th 1089c (3d Dist. 1996), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996). Likewise, the majority in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), found that a cattleman's challenge to the Cattleman's Board had not been presented "in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy." *Id.* at 1137. In the present case, petitioner argues that the challenged programs "not only further substantial public purposes, but also further the interests of respondents. . . . " Brief for Petitioner at 17. Why, petitioner implies, can't the growers see that the generic programs are for their own good?

One might counter that the respondents' motives are irrelevant – no one should be forced to pay for speech that one opposes, and to be forced to justify one's opposition may further infringe one's rights. Nevertheless, the answer to this inquiry may be significant for some purposes. Sun-Maid, a major cooperative which is opposed to being compelled to contribute to such mandatory government-administered programs, is in a position to provide this Court with a different perspective on why a substantial grower/marketer might object, in good faith and for compelling reasons, to being forced to subsidize "generic" advertising that is supposedly directed at increasing overall demand but is, in fact, inherently anticompetitive.

Stated simply, the purpose of "generic advertising" is to create a single voice for an entire industry, whether or not the individual members of that industry actually agree. The advertising explicitly represents itself to be created and endorsed by the entire industry, carrying messages of unity among the growers and carrying a "union" identification such as "California Summer Fruits," "Cattlemen's Board," "California Raisin Advisory Board," or the like.[4] To the public, such advertising cannot help but appear to carry the imprimatur of the entire industry, and thus to convey the appearance of unanimity.

For a grower/marketer which has developed (or is trying to develop) its own brand identity, such apparently

---

[4] "Each of the materials bears the logo of, or is otherwise attributed to, 'California Summer Fruits,' the 'California Tree Fruit Agreement,' or both." Brief for Petitioner at 8 n.8.

unified "generic" advertising can be very troublesome. Such advertising may effectively function as advertising *for* the competitors of the branded advertiser and *against* the branded advertiser's own efforts; or, if the branded advertiser is powerful enough on the relevant industry committee, it may be able to take control of the "generic" program and manipulate it to receive the benefits of the industry-funded advertising as well as its own proprietary marketing efforts.[5] Advertising is a matter of details: unavoidably, the details will serve the interests of one group or another within a supposedly unified group. Given the structure of marketing committees, this can often result in a majority taking advantage at the expense of a minority.

In the raisin industry, for example, Sun-Maid's famous trademark has earned international goodwill for Sun-Maid since 1915. Sun-Maid has also consistently promoted the health and nutrition aspects of raisins. The emergence of a "generic" advertising program, based on dancing raisins and other "entertainment" values. had the effect of diluting the power of Sun-Maid's mark and message, which Sun-Maid had spent decades and millions of dollars to develop.

The details of the generic raisin campaign have repeatedly favored those of Sun-Maid's competitors who did not have their own brand identity to protect. For example, at one time it was decided that the raisin box shown in the ads should not be red, because Sun-Maid's

---

[5] See the discussion of the almond industry at note 8, infra, and the text accompanying that footnote.

package is red. So a purple box was used. But then other growers started using the purple box, effectively tying their products to the ads – something Sun-Maid could not do without destroying its own longtime trade dress. In one foreign campaign a Sun-Maid competitor was allowed to purchase a "tag-line" at the end of generic ads, effectively transforming them into specific branded ads for the competitor. In the United Kingdom, CALRAB introduced raisin canisters carrying the image of the "Dancing Raisins" into direct competition with Sun-Maid's own canisters. Likewise, "California Raisins" packages were introduced in Taiwan and Russia.[6] In effect, the generic program turned "California raisins" into a competitive brand: a brand that Sun-Maid had paid to create, but could not use without harming its own long-established identity.[7]

---

[6] The Russian package, for example, was described as "a special generic brand 'California Raisins' package . . . developed exclusively for the CIS. It features photographs of the American flag and California raisins on the front panel and photographs of four different ingredient uses for raisins on the back panel. . . . The raisins are packed under the authority of the Raisin Administrative Committee and being distributed by Commerce International of Moscow, Russia." CALRAB press release reported by BUSINESS WIRE, December 21, 1993 (available through the LEXIS Marketing Library).

[7] The inherent tendency of a supposedly generic promotion campaign to favor one producer over another can also be seen in the way the very name "California Raisins" has been seized by Sun-Maid's competitors as a competitive brand. For example, on the World Wide Web at the home page called HTTP://WWW.CAL-RAISIN.COM will be found, not the California Raisin Advisory Board or the Raisin Administrative Board, but rather one of Sun-Maid's competitors. (Sun-Maid's own Web address is, of course, HTTP://WWW.SUN-MAID.COM.) Another example of such programs' inherent unfairness can be seen in the complete

Similar problems and conflicts have turned up in the other programs to have been considered by the courts:

– In the present case, respondents contend that the generic program favors the growers of red-flesh nectarines (apparently a majority of the committee board) over those who grow yellow-flesh fruit, and that "generic" funds have been used to promote a proprietary nectarine, the "Red Jim," owned by one member of the board. *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1377 n.6 (9th Cir. 1995).

– The Ninth Circuit identified drastic inequities in the almond program. In *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), *petition for cert. filed* (May 20, 1996), the court expressly found that "the regulations *hinder* the handlers' efforts to increase sales and returns to growers," *id.* at 438, and that ultimately "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers. . . . ", *id.* at 440.[8]

---

absence from the generic "Dancing Raisins" campaign of any role for golden raisins, which are produced by a different method from dark sun-dried raisins. Golden raisins, a distinct category of raisin product, were subject to the same state assessments as other raisins, but never appeared in the generic campaign.

[8] The almond industry provides an interesting contrast with the raisin market. In each, an important cooperative has a substantial share of the market and a history of independent advertising. In the case of almonds, the leading cooperative had an absolute majority of the market and thus, the Ninth Circuit

– The Third Circuit upheld the beef promotion program in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), but in dissent Judge Sloviter pointed out that the program seemed to have no real regulatory function at all, *id.* at 1144, and that its advertisements made claims questionable to some, *id.* at 1147.

– In the recent state appeals court decision striking down California's kiwifruit program, the lead opinion noted that the state commission "has failed to show that its program has had any effect whatsoever on grower returns", *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 775, 53 Cal. Rptr. 2d 138, 142 (3d Dist. 1996), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996), and that the number of kiwifruit producers had declined during the program, *id.* at 781 n.16, 53 Cal. Rptr. 2d at 146 n.16, *as modified*, 46 Cal. App. 4th 1089c. The concurring justice summarized the problem: the program "permits large growers, who produce the majority of kiwifruit and stand to gain the most from an expanding market, to pass a referendum obligating all growers, including small growers . . . who have little hope of marketing their crops on an international or even

---

found, it was in a position to control the advertising program to the detriment of smaller growers. By contrast, although Sun-Maid is the largest raisin grower/packer, it does not have a majority of production and thus Sun-Maid's competition is in a position to control the program. The point is that one way or another, the program will be skewed unfairly, favoring one side or the other. In either set of circumstances, coerced funding of advertising by those whom it hurts is simply inappropriate under the First Amendment.

national level, to pay an assessment which in effect subsidizes the larger growers' marketing efforts", *id.* at 790, 53 Cal. Rptr. 2d at 152 (Scotland, A.P.J., concurring).[9]

– Most recently, the press has reported that the U.S. District Court in Sacramento has ruled against the California Milk Advisory Board's mandatory assessment, after the owner of Gallo Cattle Company (reportedly the largest dairy farm in the United States), complained that the program was forcing him to subsidize "advertising that his competitors' cheeses are as good as his are [and] . . . to promote milk, which he doesn't even sell." Darlin, *Gallo's Whine*, FORBES, June 17, 1996, at 78; BUSINESS WIRE, July 27, 1996 (available through the LEXIS Marketing Library), reporting on *Gallo Cattle Co. v. U.S. Dep't of Agriculture*, No. CIV-S-96-1146 DFL JFM (E.D. Cal.).

In some of these cases the larger growers' interests have taken precedence over those of the smaller; in other cases the large growers' independent advertising efforts are being subverted for the benefit of those who don't advertise separately. The universal conclusion, however, is that the programs are almost always unfair to somebody, because there isn't often such a thing as truly "generic" advertising that helps the whole industry at the

---

[9] The California Supreme Court has granted review in the kiwi case, in which each of the three Court of Appeals justices wrote a separate opinion. 96 Daily Journal D.A.R. 10167 (August 14, 1996). The California Supreme Court has also deferred all additional briefing in the case, perhaps because the present case is pending before this Court.

same time. And it would be no answer to tell the complainants in each industry to take their specific grievances to court if they think the program is unfair. Surely it would not be desirable to have the courts reviewing each small detail of each of these programs to decide if they are unfair, and if so whether the unfairness is unconstitutional. Better to acknowledge that generic advertising is inherently biased, and to allow independent growers and handlers in each industry to judge this for themselves and to have the right to withdraw.

In any case, these stories explain what is wrong with petitioner's argument that forced funding is permissible because it implicates "purely commercial speech that promotes consumption of products that respondents have voluntarily chosen to sell," Brief for Petitioner at 15. A grower or handler may have voluntarily entered a particular commodity market, but it never agreed to pay for the marketing of its *competitors'* products and the negation of its own marketing efforts. True, "purely commercial speech" is at issue here, but this does not make the infringement less significant: this Court has held that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

Nor can the problems with generic programs be marginalized as nothing more than "disagreement over advertising strategies." Generic advertising effectively forces everyone in the industry to join hands and sing a single tune of praise to what the majority decides. Inherently, by promoting all nectarines (or cheeses, or raisins)

at the same time and with the same slogan, generic ads encourage the status quo, discourage the innovation and product differentiation that would otherwise occur in a competitive market, with various industry players looking for more efficient, more attractive, more convenient uses for the product in an effort to better please the consumer. Even the Secretary of Agriculture has acknowledged the vital importance of such innovation. "Time and time again," Secretary Glickman said in a recent press release, "we hear that agriculture must do more to encourage the production and marketing of value-added commodities – that's where the jobs are, that's where the growth is." *USDA Announces Market Access Program Allocations for Fiscal 1966*, USDA PRESS RELEASE NO. 0233.96 (May 3, 1996)[10]

Innovative product differentiation can and does occur. For example, Sun-Maid has recently received a patent for a new method of sun-drying raisins while still on the vine. U.S. PATENT NO. 5,411,561 (May 2, 1995). The raisins produced by this method will have a lighter color and fruitier taste, which may be expected to please some consumers more than others. Another recent Sun-Maid patent sets forth a method for producing high-moisture raisins suitable for baking and other food processing purposes without prior preparation. U.S. PATENT NO. 5,397,583 (March 14, 1995). Both of these new products will require special promotion, and any generic raisin advertising programs would be of no help – indeed,

---

[10] This USDA press release can be found on the Internet at HTTP://WWW.USDA.GOV/NEWS/RELEASES/1996/05/0233.

would more likely support the existing mainstream product. In each case, Sun-Maid has taken up Secretary Glickman's challenge and produced a new, value-added commodity – but the generic advertising program discourages such innovation, and even penalizes it, forcing the innovator to pay for advertising that supports its uninnovative competition.

Petitioner argues that generic advertising is necessary – and must be compelled by government action – because otherwise "individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit." Brief for Petitioner at 46. But such individuated speech on behalf of self-interest is exactly the diversity of expression that the First Amendment protects. As one judge observed in the recent decision invalidating California's mandatory assessments for kiwifruit promotion, "the state's interest underlying the kiwifruit marketing program does not include the advancement or preservation of harmony among kiwifruit growers." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 790, 53 Cal. Rptr. 2d 138, 152 (3d Dist. 1996) (Scotland, A.P.J., concurring), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996). Mandatory generic advertising forces all members of the industry to finance, and to be identified with, the projection to the public of a false consensus. It conveys that its messages are supported with a unanimity that does not exist, that the entire industry endorses with solidarity the proclamations of the "Tree

Fruit Agreement" or the "Raisin Administrative Committee."

The government's avowed intent for this forced associative speech is to manipulate public understanding and public demand, supposedly for a greater "public interest." This Court has repeatedly made clear that such a purpose is illegitimate: like the advertising ban invalidated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), it is a "highly paternalistic approach" aimed at "keeping the public in ignorance." By forcing all members of the industry to pay for the creation of this fictitious unified consensus, it "screen[s] from public view the underlying governmental policy" of suppressing competitive conduct, a purpose identified as suspect by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 n.9 (1980). It "not only hinder[s] commercial choice, but also impede[s] debate over central issues of public policy," like the ban struck down last term in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996).[11]

Perhaps recognizing the inherent impropriety of forcing a grower to pay for advertising against its will, several of the *amici* deny that mandatory advertising

[11] Stated another way, "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," an interest that Justice Thomas found to be "*per se* illegitimate" in his concurrence in *44 Liquormart*, 116 S. Ct. at 1516.

implicates private speech rights at all, but rather constitutes "government speech" not subject to control by private citizens. This Court disposed of the argument succinctly in *Keller v. State Bar of California*, 496 U.S. 1 (1990). This Court held that for First Amendment purposes the State Bar of California could not be treated as a government agency: its funding came "not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors"; only lawyers could be members and all lawyers were required to be members; and the ultimate governance of the legal profession was committed to the State Supreme Court, not the Bar. *Id.* at 11. The Bar "was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers." *Id.* at 13. The parallels between the bar and the commodity boards at issue here are extremely close.[12] The "government

[12] The attempts of *Amici* National Association of State Departments of Agriculture *et al.* ("NASDA"), to distinguish *Keller* are unavailing. NASDA argues that the boards were "formed in the first instance by *Congress* 'as part of the democratic process' " and that they operate pursuant to government regulation and the supervision of the Secretary of Agriculture (Brief of Amici NASDA at 16) – but of course the California State Bar was likewise formed by the state legislature and placed under the supervision of the State Supreme Court. With respect to this issue, there is simply no meaningful difference between the organizations at issue here and the State Bar which the court found subject to the First Amendment in *Keller*.

speech" argument has ultimately been rejected by all of the appellate courts which have considered generic advertising,[13] and the government rightly disclaims any reliance on the argument here. Generic advertising programs are emphatically *not* created with the input of the elected representatives of all the people. Rather, they are controlled and financed by a board chosen by and from the industry on whose behalf the ads are made; they explicitly claim to represent the voice of the *industry*, not the government.[14] Thus, they falsely claim the apparent approval of the whole industry, and are mandatorily funded by everyone; they are no less coercive to an individual grower or marketer, who would otherwise choose not to support the program or its message, than was the state's demand that a pacifist display the slogan "Live Free or Die" on his license plate in *Wooley v. Maynard*, 430 U.S. 705 (1977).

In effect, mandatory group advertising forces every member of an industry to subscribe financially to a kind

---

[13] Even in *United States v. Frame*, which upheld the beef promotion program, the court found that "the compelled expressive activities . . . are not properly characterized as 'government speech' " inasmuch as it presented a situation in which "the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group. . . . " 885 F.2d at 1132.

[14] Petitioner points out, "Each of the materials bears the logo of, or is otherwise attributed to, 'California Summer Fruits,' the 'California Tree Fruit Agreement,' or both" – not USDA. Brief for Petitioner at 8 n.8. Likewise the "Dancing Raisins" were sponsored by the California Raisin Advisory Board, not the state department of agriculture.

of "loyalty oath" on behalf of the interests defined by a majority of the industry. This compulsion results in advertising that deceptively, designedly purports to represent the collective voice of all, and suppresses the ability of a dissenter to convey that dissent. Such a compulsory program does not honor the First Amendment.

2. Given the available alternatives, the programs at issue here constitute a substantial additional burden on First Amendment rights and are therefore unconstitutional.

The proponents of mandatory advertising assessments point to the "free rider" problem as their primary justification for the compulsory nature of the programs. The problems and abuses in such programs, as outlined in the previous section of this brief, suggest that no argument is enough to sustain mandatory advertising. But even if the free rider problem is deemed compelling enough to justify *some* kind of industry-wide program, careful consideration of the issue demonstrates that the programs at issue in *this* case cannot withstand scrutiny.

As Justice Scalia wrote in partial concurrence in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991),

> "Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow."

Id. at 556 (Scalia, J., concurring in part and dissenting in part). Under the test for restrictions on commercial speech, the inquiry is whether the infringement of First Amendment rights is "more extensive than necessary than is necessary," *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Under the line of compelled-funding cases beginning with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the inquiry is whether the compulsion is "germane" to and justified by the purpose – i.e., the avoidance of free riders – and whether it "does not significantly add to the burdening of free speech" inherent in the compulsory arrangement. *Lehnert*, 500 U.S. at 520. Sun-Maid will leave to the parties and other *amici* the discussion of which test applies here; under any of these tests, however, the programs at issue here fail, because the free rider problem can be handled with little or no infringement on First Amendment freedoms.

Cooperatives like Sun-Maid constitute a *voluntary* alternative to compulsory group advertising. Petitioner argues that small growers need the industry-wide program "to obtain the benefits of advertising that they could not afford on their own." Brief for Petitioner at 27. But if cooperative membership is available, the small grower can gain these advantages if they are wanted, without being compelled to pay for them if they are not. (And, at least in some markets, the grower may also have a *choice* between co-ops, rather than being compelled to join a single government-mandated commodity association.) Congress recently acknowledged the ability of cooperatives to provide this alternative; in section 516(a)

of the Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act"), 110 Stat. 888, 1041, the Secretary of Agriculture is empowered to grant cooperatives a credit against the industry-wide assessments for their branded marketing, research, and information programs. The conference committee report explained,

> The Managers recognize the important role of farmer-owned cooperatives in carrying-out [sic] industry financed generic promotion, research and information activities for and on behalf of their members. The Managers also recognize that in many cases, such cooperative marketing efforts have involved the successful establishment of specific brands for many agricultural products. Further, that producers through their cooperatives have invested and continue to invest significant resources related to market research, promotion and advertising to enhance the sale of the products and improve their income. . . . [The credit] would ensure that producers would be able to engage in such cooperative marketing activities without adding to their cost relative to other industry members.

HOUSE CONF. REPORT NO. 104-494 at 406-07, *reprinted in* 1996 U.S. CODE CONG. & AD. NEWS 683, 772 (1996).

In light of the cooperatives' ability to provide the benefits of industry action on a voluntary basis, without the severe infringements on First Amendment freedoms caused by mandatory industry-wide funding of generic promotion, **such mandatory programs should always provide an exception for cooperative members, and**

compulsory advertising assessments should be permissible, if at all, only in industries where the voluntary cooperative is not a possible alternative.

Moreover, First Amendment considerations dictate that **credits for private branded promotion and advertising should *always* be required** if an industry advertising program is to survive constitutional scrutiny.[15] Such credits would clearly solve any "free rider" problems, while reducing the compulsory aspects of the industry program (of course, such a program would still have the effect of compelling every member of the industry to spend money on *some* form of promotional activities, and thus would remain questionable). In light of the problems found by the Ninth Circuit in the almond program, where the credits were unreasonably restrictive and seemed "designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers," *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429, 440 (9th Cir. 1993), such credits must be required to be full, fairly administered, and available

---

[15] "To the extent the state has a legitimate interest in preventing 'free riders,' no reason has been advanced why it could not satisfy this concern and meet its interest . . . by requiring growers either to pay the assessments or spend an equivalent amount on individual advertising. Although this still would result in compelled commercial speech [citing *Cal-Almond*], it would be less restrictive of the growers' First Amendment rights as it would allow a grower to decline to participate in the mass advertising program, thereby precluding coerced association." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 790, 53 Cal. Rptr. 138, 152 (3d Dist. 1996) (Scotland, A.P.J., concurring), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996).

to all who engage in branded promotion. As noted above, Petitioner opposes mandatory credits because "there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit." Brief for Petitioner at 46. But, as discussed more fully above, the government does not have a legitimate interest in suppressing competitive divergences, cannot require them to subsidize advertising that is *not* in their own interests.

The *Abood/Keller* "compelled financing" line of cases suggests another element that any government-compelled advertising program must contain: regular, careful review justifying the program and ensuring that the monies are being used for legitimate purposes. *See Keller*, 496 U.S. at 16-17. The fact-specific nature of each program should not be overlooked: needs and effects will differ between industries. (For example, in this case a number of *amici* have stressed the perishability of the commodity as a justification for government programs to regularize demand; but perishability is not so much a factor in Sun-Maid's business, where raisins last a long time and can be stored.) We note that Congress this year adopted such independent review requirements in section 501(c) of the FAIR Act.

The Ninth Circuit found it particularly significant that the nectarine and peach promotion programs at issue here had no credit provisions whatsoever. 58 F.3d at 1380. Although this Court may hold that the Ninth Circuit should have used the *Abood* test, or some other test, rather than the *Central Hudson* analysis, this does not change the conclusion that the programs were unduly

restrictive and constituted substantial additional burdens on free speech.

CONCLUSION

Because the generic promotion programs at issue here do not meet any of the possible legal tests, they cannot be sustained under the First Amendment. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

CATHERINE A. CONWAY
VINCENT M. WALDMAN*
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone (310) 312-4000
Counsel of Record

Dated: September 26, 1996